131

(3)

No. 08-1138

Supreme Court, U.S.
FILED
JUN 12 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AUREUS HOLDINGS, LTD. and DONALD SCHULTZ,

Petitioners,

v.

THE CITY OF DETROIT and JAMES DOCKERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

ROBERT D. SHEEHAN
Counsel of Record
SHAWN R. CIOFFI
KENNETH A. KOLUCH
SHEEHAN & ASSOCIATES, PLC
1460 Walton Boulevard
Suite 102
Rochester Hills, MI 48309
(248) 650-5366

Attorneys for Petitioners

223373

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ...	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
I. STATEMENT OF INTERVENING CIRCUM-STANCES OF A SUBSTANTIAL EFFECT AND GROUNDS FOR REHEARING NOT PREVIOUSLY PRESENTED	1
II. *GANT* AND *FOFANA* EVOKE CONFUSION CONCERNING THE LEGALITY OF A WARRANTLESS SEARCH IN A PUBLIC PLACE	2
III. A REHEARING SHOULD BE PERMITTED TO DETERMINE THE SCOPE OF WARRANTLESS SEIZURES.	4
IV. CONCLUSION	6

TABLE OF CITED AUTHORITIES

Page

CASES

Arizona v. Gant, 129 S. Ct. 1710 (2009) ..... *passim*

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004) 5

New York v. Belton, 453 U.S. 454 (1981) 2

U.S. v. Fofana, __ F. Supp. 2d __ (2009) ..... *passim*

UNITED STATES CONSTITUTION

Fourth Amendment 1, 3, 4

I. STATEMENT OF INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL EFFECT AND GROUNDS FOR REHEARING NOT PREVIOUSLY PRESENTED

One of the core freedoms guaranteed by the United States Constitution is the Fourth Amendment Right to be free from unreasonable searches and seizures. This inherent freedom was recently addressed by the United States Supreme Court in the case of *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which was decided while this Petitioner's Petition for Certiorari was pending. *Arizona v. Gant* addressed the issue of a warrantless automobile search conducted after the Defendant had exited his vehicle. This Court's opinion in *Gant* limited the scope of warrantless searches, and reaffirmed the validity of warrantless searches when officers have probable cause to believe in the occurrence of criminal activity. Both of these core principles are paramount concepts in Petitioner's instant Petition for Rehearing.

Gant was swiftly applied by the United States District Court for the Southern District of Ohio to allow the suppression of evidence seized at an airport checkpoint in *U.S. v. Fofana*, 2009 WL 1529815 (S.D. Ohio 2009). In light of *Gant's* apparent applicability to warrantless searches not exclusive to vehicle stops, this Honorable Court should grant the instant Petition for Rehearing. *Gant's* limitation on the scope of warrantless searches and seizures was not addressed in the Petition for Certiorari and is sole the issue to which this Petition for Rehearing is limited. The present case provides an opportunity for this Court to clarify the parameters of

a warrantless search and seizure of property as it relates to a lawful firearm on display in a public place.

II. *GANT* AND *FOFANA* EVOKE CONFUSION CONCERNING THE LEGALITY OF A WARRANTLESS SEARCH IN A PUBLIC PLACE

In *Gant* the Defendant was arrested for driving with a suspended license after he had exited his car in front of a residence that the police suspected was being used to sell drugs. Shortly before the Defendant arrived, two suspects had already been arrested and secured in the police officers' patrol car. The officers conducted a search of the Defendant's vehicle during which they discovered cocaine in the pocket of a jacket in the car's backseat. The Defendant was convicted of multiple drug crimes. This Court issued a divided opinion under which the majority affirmed the Arizona Supreme Court's holding that the arrest was unlawful. In the majority opinion, Justice Stevens addressed the Fourth Amendment concern of "... giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.* at 1720. The Court also distinguished *Gant* from *New York v. Belton*, 453 U.S. 454 (1981) a case in which this Court had previously held that an arresting officer may contemporaneously search a vehicle after a lawful arrest of its occupant. The Court specifically stated that allowing vehicle searches incident to all arrests would serve no purpose except to provide police entitlement. The Court also noted that it would be and an ". . . anathema to the Fourth Amendment" to permit a warrantless search on that basis. See *Id.* at 1721.

The *Gant* opinion was swiftly applied to situations other than vehicular searches. For example, in *U.S. v. Fofana* (cited above), the Defendant alleged that evidence obtained as a result of an airport checkpoint search violated his Fourth Amendment right to be free from unreasonable searches and seizures. In that case the Defendant proceeded to a security checkpoint shortly after obtaining his boarding pass. At the checkpoint he presented a valid state driver's license. He subsequently passed through the metal detectors without setting off the alarm. He was however chosen as a random search "Selectee" by the airport's Computer Assistance Prescreening System. Security conducted a hand search of his luggage and discovered multiple passports and several envelopes filled with cash. The Defendant was subsequently arrested for carrying false identification.

The Defendant filed a Motion to Suppress the Physical Evidence that was obtained as a result of the airport search. The motion was granted. Citing *Gant*, the Trial Court observed that one of the central concerns underlying the Fourth Amendment was to prevent the State from having unchecked discretion to search an individuals possessions. That concern, according to the Court, is implicated if checkpoint searches are permitted to balloon from "narrowly defined searches for guns and explosives" into "generalized law enforcement searches." In other words, the need for heightened security does not render every conceivable checkpoint search reasonable. Where evidence demonstrates that the intrusiveness of a passenger's search is ramped-up based upon a desire to detect evidence of ordinary criminal wrongdoing, the search cannot be justified. *Id.*

Fofana demonstrates that the limitation on warrantless searches found in *Gant* is not reserved to automobile searches. In the Petition at issue, Respondent Office James Dockery's warrantless search of the Petitioner's property in a public place was conducted solely for the purpose of detecting purported wrongdoing. Indeed, there was no reason for Officer Dockery to suspect that the firearm was associates with any criminal activity. The unlawful search developed into the unlawful seizure of Petitioner's shotgun, thus resulting in a clear Fourth Amendment violation.

III. A REHEARING SHOULD BE PERMITTED TO DETERMINE THE SCOPE OF WARRANTLESS SEIZURES.

In light of this Court's recent clarification regarding the scope of unlawful searches, a rehearing should be permitted so that this Court may determine the legality of a warrantless search and seizure conducted in a public place where there was no evidence of criminal activity.

In the instant matter, the Plaintiff presented evidence establishing that Officer Dockery confiscated a legal and lawfully registered shotgun after entering public property and issuing a citation to Petitioner Schultz for failing to provide identification. *Gant* restated the long held rule that warrantless searches are per se unreasonable under the Fourth Amendment - subject to but a few exceptions. See *Id.* at 1716. One of these exceptions, the plain view doctrine, is only applicable in situations where there is probable cause to associate property with criminal activity. Officer Dockery's unlawful, unprovoked seizure of the shotgun

is a clear example of the "unbridled discretion to rummage through the Petitioner's property" that *Gant* seeks to prevent. In short, Officer Dockery did not seize the shotgun because he suspected criminal activity; he seized the shotgun because he wanted to. Furthermore, the damage suffered by the Petitioner was not diminished by the fact that the weapon was eventually returned, as there are no *de minimis* violations of the United States Constitution. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 37 (2004).

The limitation that *Gant* places on the State's broad discretion to conduct a warrantless search should be applied to its authority to seize private property. The Trial Court erred when it determined that the jury's verdict was not against the great weight of evidence. Plaintiff's constitutional protection against unreasonable seizures was violated by Dockery, as it was unlawful for him to conduct a search and seizure of Petitioner's property absent probable cause and suspicion of criminal activity.

IV. CONCLUSION

Wherefore, Petitioner requests that this Honorable Court grant this Petition for Rehearing to clarify the scope of *Gant* and its implications on not just warrantless searches but also on warrantless seizures.

Respectfully Submitted,

ROBERT D. SHEEHAN
Counsel of Record
SHAWN R. CIOFFI
KENNETH A. KOLUCH
SHEEHAN & ASSOCIATES, PLC
1460 Walton Boulevard
Suite 102
Rochester Hills, MI 48309
(248) 650-5366

Attorneys for Petitioners

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.